94

Office - Supreme Court
FILED
MAY 22 1954
WILLEY, C

IN THE

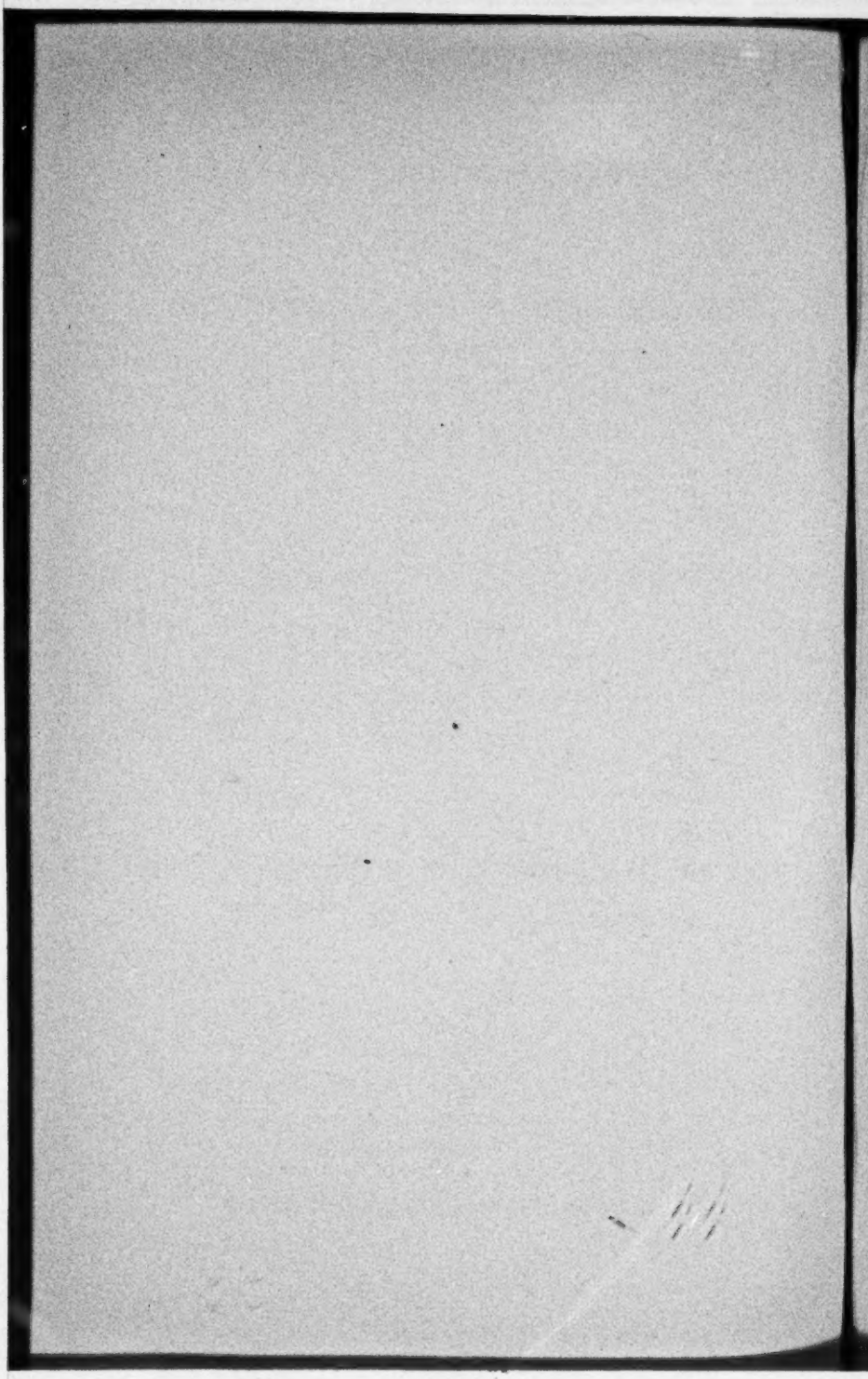
Supreme Court of the United States

No. 690

THOMAS KENNETH WOLFE,
Appellant,
vs.
CHARLES M. TASKA,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

PRESTON P. TAYLOR,
Counsel for the Respondent
916 National Bank of Commerce Bldg.
Norfolk, Virginia



SUBJECT INDEX

	Page
JURISDICTION OF THIS COURT	2
STATEMENT OF FACTS	2
ARGUMENT	5
DOCTRINE OF LAST CLEAR CHANCE	7
CONCLUSION	9

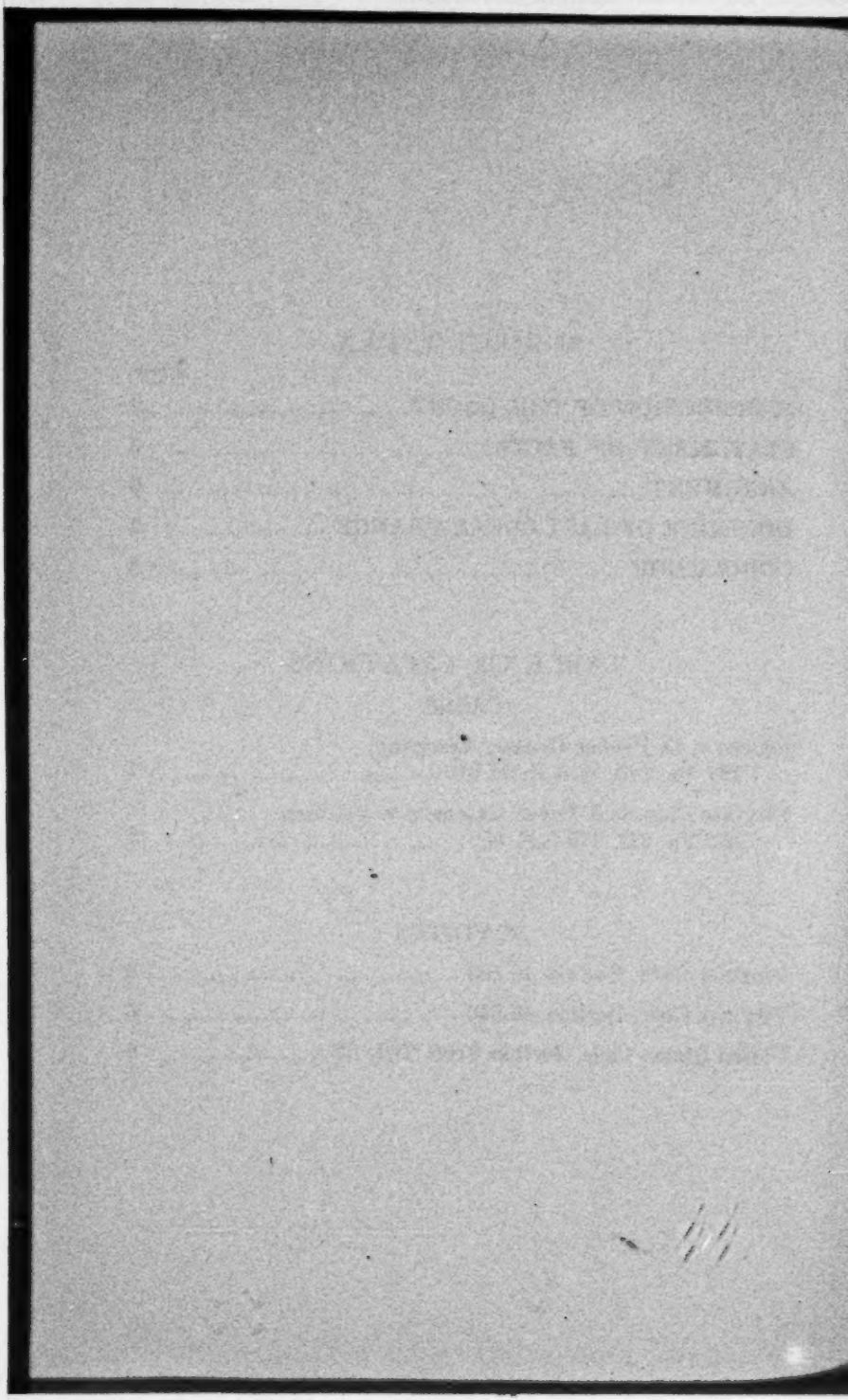
TABLE OF CITATIONS

CASES

Penoso v. D. Pender Grocery Company, 177 Va. 245, 13 S.E. 2d 310	7
Virginia Electric & Power Company v. Vellines, 162 Va. 671, 175 S.E. 35	7

STATUTES

Virginia Code, Section 46-183	6
Virginia Code, Section 46-240	6
United States Code, Section 2106, Title 28	9



IN THE

Supreme Court of the United States

No. 690

THOMAS KENNETH WOLFE,

Appellant,

vs.

CHARLES M. TASKA,

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

The respondent respectfully submits that the opinion of the United States Court of Appeals for the Fourth Circuit filed on December 21, 1953, and the subsequent decision of said Court denying a re-hearing should not be disturbed. By the aforesaid opinion a judgment for $47,500.00 entered on the verdict of a jury in the United States District Court for the Eastern District of Virginia at Richmond, Virginia, was reversed and the case remanded with instructions to enter up final judgment for the respondent.

JURISDICTION OF THIS COURT

The appellant is seeking to invoke the jurisdiction of this Court on two grounds, (1) on the ground that the United States Court of Appeals for the Fourth Circuit has decided an important question of local law in a way probably in conflict with cases with similar facts heretofore decided by the state courts of Virginia, and (2) that said decision is contrary to the provisions of the Seventh Amendment to the Constitution of the United States because, as contended by the appellant, said decision is contrary to the laws of the State of Virginia and takes away from the appellant the benefit of a trial by jury.

In order to determine whether or not the decision of the United States Court of Appeals for the Fourth Circuit is contrary to Virginia state decisions, it might be well to here briefly set forth the facts in this case.

STATEMENT OF FACTS

With the exception of respondent's testimony with respect to appellant's horse rearing up after it got to the eastern edge of the road, the undisputed facts are as follows:

This accident happened at approximately 1:30 P.M. on June 24, 1951, on U. S. Highway No. 1, which is hard surfaced and runs approximately north and south between Petersburg, Virginia, and Richmond, Virginia. At the time of the accident the road was dry and the weather was clear. The highway at this point is 41 feet wide and consists of four traffic lanes, two for northbound traffic and two for southbound traffic. At the point of this accident there are two solid white lines in the center of the highway, with a broken line down the center of the lanes for north and southbound traffic. The road is level and

straight for three city blocks or more both north and south from the scene of the accident, and is a very much-traveled highway.

Appellant attempted to ride his horse from the west to the east side of the highway. He started to cross the highway from a private lane, or private premises, practically in front of Bennett's Restaurant, which is on the west side of the highway. There was no nearby traffic on this highway at the time of the accident other than the appellant and the respondent, and the appellant admits he had nothing to look out for or watch from the time he saw respondent's car until the time of the accident.

One hundred feet to the north of the point at which appellant attempted to cross U. S. Highway No. 1, there is an intersecting road, and 296 feet to the south of the point at which appellant attempted to cross this highway there is likewise an intersecting road.

The respondent was driving his automobile from Petersburg to Richmond in his extreme right lane of traffic and collided with appellant and his horse at a point in his (respondent's) right hand lane of traffic going towards Richmond.

Appellant testified that when he came up to the western side of this highway while riding his horse, he turned his horse to the right and proceeded on the dirt shoulder on the western side of the highway towards Petersburg, and when he got to a point opposite Bennett's Restaurant he first looked to his right down the highway and then to his left, and upon seeing no traffic coming from either direction, he proceeded to cross the highway from the west to the east. He also testified that when he got to the middle of the highway, that is, at the dividing

line between the north and south bound lanes of traffic, he looked to his right and saw respondent's car approaching him on respondent's right hand side of the extreme right north bound traffic lane and at a point about 300 feet away from him, and respondent's car seemed to be going "pretty peart", which he later defined as "pretty fast". Appellant then proceeded to attempt to complete the crossing of the road with his horse at a walk, and the appellant did not again look in the direction from which he had seen respondent coming any more and did not see respondent or his car until he (appellant) was struck by respondent's car.

Appellant also testified that there was no traffic on the road for him to watch coming in either direction other than respondent's car, and he had an unobstructed view of respondent's car had he looked again after leaving his place of safety in the middle of the road. Appellant also testified that he had his horse under perfect control and could have stopped him in his tracks at any time during the crossing.

The speed limit in the area where this accident happened is 50 miles per hour. Respondent testified his car, which was in good mechanical condition, was on his extreme right hand side of the road and traveling within the speed limit (50 mph.) going towards Richmond, and when he first saw appellant and his horse they were about 200 yards in front of him and in the center of the highway and the horse was walking at a normal gait, and walking towards the eastern edge of the road. Respondent says he then took his foot off the accelerator to deaccelerate the car because he figured with the horse continuing at its then walking gait the horse would clear the road before respondent reached the point of crossing, but when

respondent got about 40 or 50 feet from the horse, and at a time when the horse was partly or wholly off the hard surface of the eastern side of the road, the horse started prancing or rearing up, whereupon respondent applied his brakes and veered his car from the right lane going north over to the passing lane going north, and as he reached the point where the horse was, the horse came down on top of the hood of respondent's car. Skid marks left on the road by respondent's car started in the extreme right lane going north and veered over to the passing lane going north, and extended for a distance of 25 or 30 feet. The car came to a complete stop at the end of these skid marks.

ARGUMENT

The appellant, in reciting the facts in his petition for a writ of certiorari, made no mention of the all-important fact that as the appellant was crossing this very much-traveled four-lane highway he had his horse under perfect control and could have stopped him in his tracks at any time he chose, and that when he (appellant) got in the middle of this highway he looked to his right and saw the respondent coming about 300 feet away and coming towards him at a "pretty peart" or fast rate of speed, and, seeing this, the appellant proceeded on to cross the remainder of the highway without again looking in the direction of the respondent, and was struck by respondent's car just about the time he had completed the crossing; nor does the appellant mention the fact that there was no traffic on the road for him to watch out for other than the respondent; nor does appellant mention the fact that he entered this highway from a private lane or private premises and, therefore, under Virginia state law,

he had to yield the right of way to all vehicles approaching him within a reasonable distance.

It will be seen from the statement of undisputed facts that the appellant left a place of safety in the center of the road and deliberately proceeded to cross the highway in the face of a fast-approaching car, and did this without paying any further attention to the approaching car after he had seen it coming towards him at a fast speed, and after knowing that their respective paths must cross each other at right angles.

The rights and duties of the appellant in crossing this highway are determined by Virginia Code Section 46-183, which reads as follows:

> "PERSONS RIDING BICYCLES OR RIDING OR DRIVING ANIMALS SUBJECT TO TRAFFIC REGULATIONS.—Every person riding a bicycle or an animal upon a roadway and every person driving any animal shall be subject to the provisions of this chapter applicable to the driver of a vehicle, except those provisions which by their own nature can have no application."

Also, since appellant entered this main highway from private premises or a private lane, the law required him to come to a full stop before entering this highway and yield the right of way to all vehicles approaching on the highway, and in that connection we wish to quote Virginia Code section 46-240, which reads as follows:

> "EXCEPTION TO RIGHT OF WAY RULES.—The driver of a vehicle entering a highway from a private road or driveway shall, immediately before entering such highway, stop and, upon entering such highway, shall yield the right of way to all vehicles approaching on such public highway."

We will not undertake in this opposing brief to cite the Virginia cases applicable to the facts in this case and which were cited in this respondent's appeal brief in the United States Court of Appeals for the Fourth Circuit, and we respectfully refer this Court's attention to the opinion of that Court in the case at bar, reported in 208 Fed. 2d 705.

The few Virginia cases pertaining to the merits of this case cited by the appellant in his petition for a writ of certiorari are readily distinguishable from the case at bar.

DOCTRINE OF LAST CLEAR CHANCE

The appellant did not request the trial judge in the District Court to instruct the jury on the doctrine of last clear chance, nor was there any exception on the part of appellant's counsel to the failure of the Court in instructing the jury on the doctrine of last clear chance, and it is now, therefore, too late for appellant to raise this question. But even if appellant were now able to raise the question of the doctrine of the last clear chance, we submit that the facts in this case do not justify the application of that doctrine.

The law is well settled in the State of Virginia that where the negligence of both parties continues down to the moment of the accident and contributes to the injury, the case is one of concurring negligence and there can be no recovery on the part of either party (*Virginia Electric and Power Company v. Vellines,* 162 Va. 671, 175 S. E. 35).

In the case of *Penoso v. D. Pender Grocery Company,* 177 Va. 245, 13 S.E. 2d 310, cited by counsel for the appellant on page 10 of his petition for a writ of certiorari, the Court said:

"It is not necessary further to relate the testimony in this case. Mrs. Penoso in her own testimony has set forth that, from a full stop, she started into an intersection in the path of a vehicle some seventy feet away. She further said that although her car was moving slowly and could have been stopped at any time, she did not apprehend the collision until the oncoming truck was some ten feet away. The inescapable conclusion is that she was not keeping a proper lookout. *She testified that there was no other moving vehicle in sight, and the fact that she did not pay continuing attention to the one dangerous agency confronting her makes her negligence the more serious.*

"It is true that one entering an intersection may presume that cars on the intersecting street are being operated lawfully, and that the duty to maintain proper lookout does not extend beyond a reasonable distance in each direction. However, one may not wantonly project himself into a dangerous situation, no matter how serious the derelictions of the other party. Where a person realizes or should reasonably realize that the actions of another have created a dangerous situation, there is a duty to avoid the consequences of that situation.

"When plaintiff observed the approaching truck, which was dangerously near the intersection at the time, the duty devolved upon her either to wait for it to pass or IN ANY EVENT to watch it closely and avoid it should a collision appear to be imminent. This she might have done, for her car was moving slowly." (Italics ours).

Since the duties which devolved upon the appellant in crossing this road were the same as those which would have devolved upon him had he been driving a motor vehicle, the above Virginia state law is clearly applicable in the case at bar.

CONCLUSION

Section 2106, Title 28, of the United States Code, clearly gave the United States Court of Appeals for the Fourth Circuit the right to reverse the judgment of the District Court and remand the case to that court with directions to enter up final judgment for the defendant, which was accordingly done in this case.

The case at bar is not one in which the United States Court of Appeals for the Fourth Circuit has decided a case contrary to a state statute or contrary to a fixed and definite law as laid down by the state courts in Virginia, but it is a case in which the United States Court of Appeals for the Fourth Circuit has exercised its sound judgment and discretion in applying the laws of the State of Virginia to the undisputed facts in this case, and if this be the case, then this Court has no jurisdiction in the premises.

According to the appellant's own evidence and admissions, he was guilty of negligence as a matter of law in crossing this road as hereinabove described, and his negligence in this respect is something over which fair and reasonable-minded men cannot differ, and the question of his negligence therefore was one of law to be passed upon by the court and not by the jury.

We, therefore, submit that the decision of the United States Circuit Court of Appeals for the Fourth Circuit should not be disturbed.

Respectfully submitted,

PRESTON P. TAYLOR,
Counsel for the Respondent
916 National Bank of Commerce Bldg.
Norfolk, Virginia

Dated: May 20, 1954.